

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Federal-State Joint Board on Universal Service)	CC Docket 96-45
)	
NEXTEL PARTNERS OF UPSTATE NEW YORK, INC. d/b/a NEXTEL PARTNERS)	DA 04-998
)	
Supplement to Petition for Designation as an Eligible Telecommunications Carrier in the State of New York)	
_____)	

**NEXTEL PARTNERS' REPLY TO COMMENTS
OF THE NEW YORK STATE TELECOMMUNICATIONS ASSOCIATION, INC.**

Nextel Partners of Upstate New York, Inc. d/b/a Nextel Partners ("Nextel Partners"), by its undersigned counsel, hereby submits its "Reply" to the Comments filed on May 7, 2004 by the New York State Telecommunications Association, Inc. ("NYSTA") in the above-captioned proceeding, which concerns Nextel Partners' Petition for Designation as an Eligible Telecommunications Carrier ("ETC") in the State of New York¹ as recently supplemented in compliance with the requirements of the Commission's *Virginia Cellular Order*.²

NYSTA's May 7, 2004 Comments in response to the filing of Nextel Partners' Supplement are largely repetitive of the arguments made by NYSTA in its August 18,

¹Nextel Partners' Petition for the Designation as an Eligible Telecommunications Carrier in the State of New York (hereinafter, the "Petition") was filed on April 3, 2003 in Commission Docket No. 96-45.

² *In the Matter of Federal-State Joint Board on Universal Service: Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia*, 19 FCC Rcd 1563 (2004) ("*Virginia Cellular Order*"). In *Virginia Cellular*, the Commission set forth several requirements for ETC designation in rural areas, and stated that "[t]he framework enunciated in this Order shall apply to all ETC designations for rural areas pending further action by the Commission." *Virginia Cellular Order* at ¶ 4.

2003 Comments opposing the grant of Nextel Partners' April 3, 2003 Petition for Designation as an Eligible Telecommunications Carrier in the State of New York (the "Petition"). Nextel Partners responded fully to those arguments in Reply Comments filed September 2, 2003 in the above-captioned docket, and calls the Commission's attention to Nextel's September 2, 2003 filing on those issues. In addition, Nextel provides the following response to NYSTA's May 7, 2004 comments:

INTRODUCTION

In its comments, NYSTA argues that: (i) Nextel Partners' 2004 Construction Plan attached to the Supplement does not demonstrate sufficient commitment to construction in rural areas; (ii) Nextel Partners does not currently provide sufficiently ubiquitous service throughout the areas for which Nextel Partners seeks ETC designation; (iii) Nextel Partners' Supplement does not adequately address the "cream skimming" issue; and (iv) Nextel Partners' adoption of the CTIA Code of Conduct is not enough. Based on these contentions, NYSTA asserts that Nextel Partners should not be designated as an ETC in New York State. NYSTA fails to provide facts, or meaningful analysis to support its claims. Moreover, as demonstrated herein, NYSTA's comments have no merit and accordingly Nextel Partners' Petition for ETC Designation should be granted.

A. Designation of Nextel Partners as an ETC in New York State Will Provide Important Benefits to the Citizens of New York

There are at present *no* competitive ETCs of any kind in the rural telephone company ("RTC") study areas of the State of New York.³ NYSTA and its incumbent

³ See Universal Service Administrative Company Schedule HC03, "Rural Study Areas with Competition - 3Q2004," which shows that there are *no* rural study areas in New York that have competition as of the 3rd calendar quarter of 2004. The URL is: <http://www.universalservice.org/overview/filings/2004/Q3/HC03%20-%20Rural%20Study%20Areas%20with%20Competition%20-%203Q2004.xls>

RTC constituents have *no* competition whatsoever in the provision of USF-supported services in the entire state, and based on their Comments in this proceeding, they would prefer to maintain the status quo. NYSTA's contention (at p. 6 of its comments) that addition of new competitors in the provision of USF-supported services is not necessary in the State of New York has no merit. The citizens of New York State have no less right to competitive choice than citizens of other states. Designation of Nextel Partners as an ETC will remedy the situation for citizens living within Nextel Partners' designated territory, which covers the major parts of New York State, by bringing viable competitive choice in telecommunications service providers to these citizens.

The Universal Service Program is not only intended to bring local phone service to consumers in rural, high cost and insular areas, but it is also intended to ensure that these consumers have

access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.⁴

Under the Commission's Universal Service policies, consumers residing in high cost areas and low income consumers in the State of New York should be afforded the same opportunities as other consumers to choose a telecommunications carrier, to access new technologies, realize the benefits of mobility and access to wireless emergency services and to select from a menu of innovative services.⁵ The record in this proceeding clearly

⁴ 47 U.S.C. § 254(b)(3).

⁵ See *Virginia Cellular Order* at ¶¶ 12 and 29 and Separate Statement of Chairman Michael K. Powell at ¶ 1 ("we recognize the unique value that mobile services provide to rural consumers by giving added substance to the public interest standard by which we

demonstrates that Nextel Partners' designation as an ETC will bring these telecommunications benefits to New York telecommunications users in rural, high cost and insular areas.

Nextel Partners' predominant business focus is to bring competitive state-of-the-art digital mobile telecommunications services to citizens living in secondary and rural markets. And in doing so, they provide these citizens access to the same nationwide Nextel system that is operated by Nextel Communications, Inc. in the primary U.S. markets.

In particular, Nextel Partners adds the element of *mobility* to the provision of Universal Service Fund ("USF") supported services -- a valuable option that the incumbent wireline LECs cannot match. This essential difference is particularly beneficial to consumers in rural areas, including remote roads and highways, where wireline telephones are more widely-spaced than in concentrated urban areas. As the Commission emphasizes in its recent *Virginia Cellular Order*:

. . . the mobility of telecommunications assists consumers in rural areas who often must drive significant distances to places of employment, stores, schools, and other critical community locations. In addition, the availability of a wireless universal service offering provides access to emergency services that can mitigate the unique risks of geographic isolation associated with living in rural communities.⁶

evaluate wireless eligible telecommunications carriers.") *See also In the Matter of Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776 at ¶¶ 4, 21 (1997) ("Universal Service Order"). *See also Application of WWC Texas RSA Limited Partnership for Designation as an Eligible Telecommunications Carrier Pursuant to 47 U.S.C. § 214 (e) and PUC SUBST. R. 26.418*, PUC Docket Nos. 22289 and 22295, SOAH Docket Nos. 473-00-1167 and 473-00-1168 (Texas Public Utility Commission, October 30, 2000) ("*Texas PUC Order*") at 2.

⁶ *Virginia Cellular Order* at ¶ 29.

Nextel Partners also provides a larger local calling area than the ILECs, the acknowledged benefits of mobile telephony service and, where requested by the PSAP, GPS location assistance for customers calling 911.⁷ These benefits will be expanded and made available to more rural customers in New York State as a result of Nextel Partners' ETC designation.

B. Nextel Partners is Strongly Committed to Continuing Building of its System in its Designated Areas in New York State

Nextel Partners has invested more than \$165 million in network infrastructure in the State of New York since the company's creation at the beginning of 1999. This amount covers only investment in capital and does not include operational expenses or expenditures on frequency acquisition. During this time period, Nextel Partners' line counts in New York State have grown from fewer than 10,000 to approximately 160,000. Nextel Partners' commitment to building and maintaining its system in New York State is supported by this strong track record over the past five years.

NYSTA asserts that Nextel Partners' 2004 Construction Plan for New York State submitted by Nextel Partners as part of its Supplement is insufficient based on NYSTA's contention that the plan improves service coverage only in the most populous areas, rather than the most rural areas within Nextel Partners' service territory."⁸ Specifically, NYSTA complains that Nextel Partners' 2004 Construction Plan provides for network expansion and service improvement in one rural study area, that of Cassadaga Tel. Corp., and a pair of rural exchanges in Frontier and Citizens study areas, while the balance of

⁷ Nextel Partners' Petition at 7; March 24 Supplement at 7, § 7 ("Public Interest") and Exhibit 3 ("Local Calling Area Maps for New York").

⁸ NYSTA's Comments at 6.

the construction plan focuses on system improvement in non-rural areas.⁹ What NYSTA argues is a fault with the plan, however, in reality serves only to underscore Nextel Partners' commitment to serving citizens in rural areas.

Nextel Partners' 2004 construction plan was developed to meet Nextel Partners' expected growth in customer need during 2004. Of the approximately \$4 million budgeted for construction during 2004, the new cell site in the Cassadaga rural study area accounts for \$178,000, and the new site in the Corinth rural exchange, accounts for \$147,000. This comes to a total 2004 construction commitment of \$316,000 within the rural study areas and exchanges in Nextel Partners' designated territory. Even if Nextel Partners receives designation by June 30, 2004 and is able to begin collecting USF funds for supported service, its total expected USF revenues during 2004 would be approximately \$366,000.¹⁰ Nextel Partners' 2004 construction expenditure of \$316,000 in rural study areas and rural exchanges will thus account for more than 85% of this \$366,000 total amount. Clearly, Nextel Partners is not shortchanging rural areas as suggested by NYSTA. Moreover, Nextel Partners has committed to make this expenditure in the rural study areas and exchanges without any guarantee that it will receive *any* support for 2004.¹¹

⁹ *Id.* at 7. NYSTA correctly points out that one of the Frontier exchanges (Walden) scheduled for construction in Nextel Partners' construction plan does not fall within a study area requested for designation by Nextel Partners. The inclusion of the Walden exchange – which is in fact scheduled for construction in 2004 – in the construction plan submitted with Nextel Partners' Supplement was an inadvertent error.

¹⁰ See Nextel Partners' Supplement at 9, n.14.

¹¹ Under the 2004 construction plan an additional \$127,000 will be spent in the Walden rural exchange, however this exchange is not within the areas for which Nextel Partners is seeking designation. Nonetheless, this planned expenditure serves to highlight further Nextel Partners' commitment to the citizens of rural New York State.

C. Nextel Partners Can and Will Provide its High-Quality Digital Mobile Service Throughout its Designated Areas and Will Timely Meet all Reasonable Requests for Service

NYSTA's contention that Nextel Partners is not providing sufficiently ubiquitous service to warrant designation as an ETC is equally without merit.¹² Nextel Partners is licensed to, and provides, good existing coverage in all of its Designated Areas. Nextel Partners also has specifically represented to the Commission that upon designation as an ETC, it will respond appropriately to reasonable requests for service throughout those Designated Areas, according to the same methodology approved in the *Virginia Cellular Order*. Despite NYSTA's claims, it is not necessary for Nextel Partners to demonstrate in its Petition, or by its coverage map, that it *presently* covers *all* of the areas in which it seeks designation as an ETC.

As pointed out by the Commission in the *Virginia Cellular Order* and consistent with previously issued Commission decisions, "a telecommunications carrier's inability to demonstrate that it can provide ubiquitous service at the time of its request for designation as an ETC should not preclude its designation as an ETC."¹³ Nothing contended by NYSTA in this proceeding has raised any substantive question about Nextel Partners' willingness and technical ability to serve its requested Designated Areas.¹⁴ In fact, the only showing made in the proceeding is that Nextel Partners *already*

¹² See NYSTA's Comments at 5-7.

¹³ *Virginia Cellular Order* at ¶ 23.

¹⁴ NYSTA apparently bases its arguments concerning Nextel Partners' current coverage area on a map accessed by NYSTA at a website maintained by Nextel Communications, Inc. See NYSTA's Comments at 5-6. NYSTA interprets this map as showing Nextel Partners' system covers predominantly the State's metropolitan areas and the highways running between them. In fact, Nextel Partners' coverage map for the State of New York is attached as "Attachment 3" to its Petition, and demonstrates conclusively that Nextel

serves the relevant areas, and this has not been contradicted by the submission of any contrary evidence.¹⁵

D. The “Creamskimming” Issue is Not Implicated Under Nextel Partners’ Petition Because Nextel Partners Is Not Seeking to Serve Only Portions of Any Study Area or Exchange Within its Designated Areas

NYSTA’s claim that Nextel Partners’ Supplement is “silent on the *Virginia Cellular Order* requirement to serve the entire area of a rural telephone company’s territory and to commit to provide Universal Service throughout its entire licensed area to avoid cream skimming” is inapposite to this proceeding.¹⁶ Under the *Virginia Cellular* order, cream skimming becomes an issue *only* in cases where a party makes “a request for ETC designation for an area less than the entire area of a rural telephone company.”¹⁷ This situation is clearly inapplicable to Nextel Partners’ Petition in this proceeding, because Nextel Partners has not requested redefinition of *any* RTC study area in New York, but instead has intentionally limited its Designated Areas to those study areas and exchanges that Nextel Partners is legally entitled to serve in their entirety.¹⁸

Partners has good existing coverage of the specific areas in which designation is requested.

¹⁵ NYSTA’s claim that Nextel Partners is not entitled to a “mobility credit” in this proceeding for failure to provide coverage to rural areas is absurd and does not warrant much discussion. *See* NYSTA’s Comments at 6-7. The benefits of mobility are inherent to Nextel Partners’ wireless services, and Nextel Partners has committed to provide these services throughout its Designated Areas upon reasonable request, and according to a stated methodology.

¹⁶ NYSTA’s Comments at 8.

¹⁷ *Virginia Cellular Order* at 16, ¶¶ 32-33.

¹⁸ *See* Nextel Partners’ April 3, 2003 Petition for Designation at 5-6 (“As noted above, each of these Designated Areas are study areas of rural telephone companies that Nextel Partners serves in their entirety.”)

E. Nextel Partners’ Adoption of the CTIA Code of Conduct Meets the Requirements of the *Virginia Cellular Order*

NYSTA *expressly acknowledges* that Nextel Partners has agreed to adopt the Cellular Telephone and Internet Association Consumer Code for Wireless Services (“CTIA Code”) and to annually report the number of consumer complaints per 1,000 handsets, as required by the Commission in its *Virginia Cellular Order*.¹⁹ However, Nextel Partners’ admittedly strict compliance with these requirements of the *Virginia Cellular Order* does not seem to be enough to satisfy NYSTA, which devotes a full page of its Comments complaining that the CTIA Code is not as onerous as the service quality mandates and other requirements applicable to wireline ILECs in the State of New York. This line of argumentation, however, is irrelevant to the Commission’s consideration of Nextel Partners’ Petition as supplemented, because applicable law does not require Nextel Partners to comply with the requirements set forth in the New York State “Telephone Fair Practices Act” in order to receive designation as an ETC in New York. NYSTA’s vague and general argument that, as a wireless carrier, Nextel Partners may be subject to less onerous regulation by New York State than are wireline ILECs is a matter that far exceeds both the subject-matter scope and the legal jurisdiction of the Commission in this proceeding. In fact, as NYSTA itself points out, wireless providers such as Nextel Partners have been *specifically exempted* from the jurisdiction of the New York Public Service Commission by state law.²⁰

¹⁹ NYSTA’s Comments at 8-9.

²⁰ See NYSTA Comments at 9, *citing* N.Y. Pub. Serv. Law § 5(3).

CONCLUSION

Because all applicable legal and public interest requirements have been met, Nextel Partners requests that the Commission promptly grant Nextel Partners' Petition for Designation as an Eligible Telecommunications Carrier in the State of New York.

Respectfully submitted,

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